Tan Sri Abdullah Ahmad & Ors v Dato' Dr Mahmood bin Merican & Ors

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W–02–975 OF 2002
GOPAL SRI RAM, ABDUL KADIR SULAIMAN AND ALAUDDIN JJCA
28 AUGUST 2002

Civil Procedure *— Appeal — Retrial — Application to be removed as a co-defendant — Whether the motion ought to be made to the judge before whom the action had been assigned for retrial — Whether the motion if made would be doomed to failure in the High Court*

After hearing arguments in this appeal, the Court of Appeal formed a preliminary view that the learned trial judge had seriously misdirected himself on important issues of law. With the consent of both parties, the Court of Appeal, on 4 March 2003, directed the action to be retried before another judge and ordered, inter alia, that the bank, formerly known as Bank Bumiputra Malaysia Bhd ('BBMB'), be added as a co-defendant. Subsequently, Bumiputra-Commerce Bank Bhd applied to the Court of Appeal that: (i) the former BBMB be given leave to intervene and be added as the ninth respondent in the instant appeal; and (ii) the order of the Court of Appeal dated 4 March 2002 be set aside so far as the said order added the former BBMB as co-defendant. The issues for the determination of the court were: (a) whether the motion ought to be made to the judge before whom the action had been assigned for retrial; and (b) whether the motion if made would be doomed to failure in the High Court.

Held, dismissing motion with costs:

(1) To obviate any difficulty, the Court of Appeal made it absolutely clear that the High Court has ample power and jurisdiction to entertain the bank's application to have itself removed as a party. Of course in making its decision, the High Court must apply established principles including those that govern the taking of points by way of defence rather than by way of an application to strike (see p 400C–D).

(2) The application made was misconceived. Once the Court of Appeal had disposed of this appeal as per the terms already set out in this judgment, it became functus officio. The application being devoid of any merits, was bound to fail and thus dismissed (see p 400D–E).

[Bahasa Malaysia summary

Setelah mendengar hujah-hujah dalam rayuan ini, Mahkamah Persekutuan telah membentuk satu pendapat awal bahawa hakim perbicaraan yang bijaksana telah salah arah tentang persoalan-

persoalan undang-undang yang penting. Dengan persetujuan kedua-dua pihak, Mahkamah Rayuan, pada 4 March 2003, telah mengarahkan tindakan tersebut dibicarakan semula di hadapan hakim lain dan memerintahkan, antara lain, agar bank, dahulu dikenali sebagai Bank Bumiputra Malaysia Bhd ('BBMB'), ditambah sebagai defendan bersama. Berikutan itu, Bumiputra-Commerce Bank Bhd telah memohon kepada Mahkamah Rayuan agar: (i) BBMB dahulunya dibenarkan menjadi pencelah dan ditambah sebagai responden kesembilan dalam rayuan semasa; dan (ii) perintah Mahkamah Rayuan bertarikh 4 March 2002 diketepikan berkaitan perintah tersebut di mana BBMB dahulunya ditambah sebagai defendan bersama. Persoalan-persoalan untuk ditentukan oleh mahkamah adalah: (i) sama ada usul tersebut patut dihadapkan kepada hakim di mana tindakan tersebut telah diarahkan untuk perbicaraan semula; dan (ii) sama ada usul tersebut jika dibuat akan gagal di Mahkamah Tinggi.

Diputuskan, menolak usul dengan kos:

(1) Arahan relevan adalah untuk menambahkan pencelah sebagai defendan bersama dalam prosiding di mahkamah bawahan, iaitu, tidakan-tindakan yang disatukan tersebut sementara menunggu perbicaraan semula. Adalah mat jelas bahawa Mahkamah Tinggi mempunyai kuasa dan bidang kuasa yang lebih daripada cukup untuk melayan permohonan bank untuk dikeluarkan sebagai satu pihak. Sememangnya dalam membuat keputusannya, Mahkamah Tinggi harus menerapkan prinsip-prinsip kukuh termasuklah yang mengawal perkara-perkara yang diambilkira melalui pembelaan dan bukan melalui satu permohonan pembatalan (lihat ms 400C–D).

(2) Permohonan tersebut telah disalahtafsirkan. Apabila Mahkamah Rayuan telah menyelesaikan rayuan ini sepertimana terma-terma yang telahpun dinyatakan dalam penghakiman ini, ia menjadi functus officio. Permohonan tersebut yang tidak mempunyai apa-apa merit, akan gagal dan justeru itu ditolak (lihat ms 400D–E).]

Notes

For cases on retrial, see 2 Mallal's Digest (4th Ed, 2001 Reissue) para 1176.

Appeal from: Suit No D1–22–2101 of 1990 (High Court, Kuala Lumpur)

PS Ranjan (*MS Dhillon* with him) (*PS Ranjan & Co*) for the appellants.
R Shyamala (*Hussein & Co*) for the first to seventh respondents.
Tn Hj Sulaiman Abdullah (*Anita Sockalingam* with him) (*Zain & Co*) for the eighth respondent.

A *Ramid Khan* (*PW Ng* with him) (*Tay & Partners*) for the intended intervener.

Gopal Sri Ram JCA (delivering judgment of the court): The appeal herein came before us on 28 January 2002. After hearing arguments, we formed the preliminary view; and we emphasize that this was merely a B preliminary view; that the learned trial judge had seriously misdirected himself on important issues of law. We therefore conveyed our first impression to counsel that this might be an appropriate case to order a retrial of the action. Counsel then quite properly sought an adjournment to obtain instructions from their clients. The appeal was therefore posted for mention on 4 March 2002 on which date counsel appeared before us and C informed that they had agreed to a retrial of the action. So, with the consent of both sides, we directed that the action be retried before another judge, as is the usual practice. To overcome any procedural difficulties that the parties might face on returning to the High Court, we issued certain directions as to the future conduct of the principal suits out of which this D appeal arose. These are the directions we gave as reflected in the order:

(i) that the bank, formerly known as Bank Bumiputra Malaysia Bhd, be added as a co-defendant;

(ii) appellants are not required to raise a case against the said co-defendant;

E (iii) that the appellants be given liberty to amend this statement of claim and counterclaim and all other pleadings within three weeks from the date of this order; and

(iv) that the first to seventh respondents be at liberty to amend their pleadings within three weeks from the service of the amended statement of claim.

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On Monday of 26 August 2002, we were moved by Bumiputra-Commerce Bank Bhd for, inter alia, the following orders:

(i) that the former Bank Bumiputra Malaysia Bhd be given leave to intervene and be added as the ninth respondent in the instant Civil G Appeal No W–02–975–2001 and that the title of the same be amended accordingly; and

(ii) that the order of the Court of Appeal dated 4 March 2002 be set aside in so far as the said order adds the former Bank Bumiputra Malaysia Bhd as a co-defendant to Kuala Lumpur High Court Suit No D1–22–2101–90 as consolidated with Kuala Lumpur High Court Suit H No D3–22–1178–92.

Now, we must be forgiven if we thought, at least at first blush, that the motion was quite out of place. For, it is elementary law that when this court directs a party to be added to a proceeding before the High Court, that joinder takes place not before this court but the High Court. It ought to I have been plainly obvious to those advising the proposed intervener, the bank, that the application ought to be made to the judge before whom the action had been assigned for retrial. At the risk of repetition, to emphasize

the point, the proposed intervener in this motion before us was never added or directed to be added as a party to this appeal. The relevant direction was to add the proposed intervener as a co-defendant in the proceedings below, that is to say, the consolidated actions now pending retrial.

But we must say at once, in all fairness to En Ramid Khan who appeared for the proposed intervener, that he made his position fairly clear about the difficulty in which he finds himself. He says that any application by him to the High Court may be doomed to failure even before it begins because the High Court might gain the impression that it was beyond its powers to entertain his client's application. The suggestion by counsel is that the High Court might apprehend a breach of this court's order if it were to hear and determine En Ramid Khan's client's application to exclude itself from the retrial. We understand and appreciate counsel's difficulty and it is for that purpose and that purpose only, that this judgment is being delivered.

To obviate any difficulty, we wish to make it absolutely clear that the High Court has ample power and jurisdiction to entertain the bank's application to have itself removed as a party. Of course in making its decision, the High Court must apply established principles including those that govern the taking of points by way of defence rather than by way of an application to strike.

This brings us to the present motion. We are entirely convinced that the application made to us on Monday is misconceived. Once we had disposed of this appeal as per the terms already set out in this judgment, we became functus officio.

The application being devoid of any merits, is bound to fail. It is dismissed. Our learned brother Abdul Kadir Sulaiman JCA will now deliver the formal orders we make in this case.

Abdul Kadir Sulaiman JCA: This motion is dismissed with costs to the appellants and respondents by consent at RM500 which is to be divided between the appellants and the respondents at RM250 each.

Motion dismissed with costs.

Reported by Ezatul Zuria Azhari